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Supreme Court, U.S.
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NUMBER 84-836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

DANIEL VASQUEZ, the Warden of San Quentin State Prison,

Petitioner,

v.

BOOKER T. HILLERY, JR.,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, BOOKER T. HILLERY, pursuant to Rule 46(1), Supreme Court Rules, and Title 18 U.S.C. section 3006A(d)(6), asks leave to file the attached Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis.

Petitioner qualified for appointment of counsel under the Criminal Justice Act and attorney Clifford E. Tedmon of the Law Offices of Tedmon and Tedmon was appointed to represent him in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit. Attorney Clifford E. Tedmon has represented respondent at all stages of the appeal proceedings against him and is continuing to represent him under the Criminal Justice Act. Respondent continues to qualify for appointment of counsel

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under the Criminal Justice Act.

It is, therefore, respectfully requested that respondent be allowed to proceed in forma pauperis.

DATED: January 15, 1985

Respectfully submitted,
LAW OFFICES OF TEDMON AND TEDMON

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DANIEL VASQUEZ, the Warden of San Quentin State Prison,

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Respondent.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, BOOKER T. HILLERY, respectfully prays that the Petition for Writ of Certiorari requested to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 14, 1984, and the subsequent denial of the petition for rehearing and suggestion for rehearing en banc entered on September 12, 1984, be denied.

DATED: January 15, 1985

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RESPONSE TO THE QUESTIONS PRESENTED FOR REVIEW

1. The District Court properly applied settled law in finding reversible error once the State failed to rebut Respondent's prima facie case of discrimination in the grand jury selection process.

2. The simple mathematical calculation presented to the District Court did not change the evidentiary basis of the claim presented to the state courts.

PARTIES TO THE PROCEEDINGS

Besides the parties named in the captions, the State of California, as the Real Party in Interest, is the only other party to the proceeding.

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OPINION BELOW

Respondent accepts the "Opinion Below" statement as reported in petitioner's Petition and incorporates those opinions as though fully set forth herein.

STATEMENT OF JURISDICTION

Respondent asserts that this court has jurisdiction under 28 United States Code section 1254(1) and not under 28 United States 1257(e), as stated in petitioner's Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's statement of constitutional and statutory provisions and incorporates them as though fully set forth herein.

STATEMENT OF THE CASE

Respondent makes the following additions to petitioner's statement of the case, which statement it incorporates herein, as though fully set forth.

On January 31, 1979, the District Court, per Judge MacBride, issued an order to show cause, finding that petitioner's, (respondent herein), allegations were sufficient to state a prima facie case of systematic exclusion (CR 2). See footnote 1 of Petitioner's petition at page 4 for an explanation of the reference nomenclature used herein.

The term "prima facie" has been used in two contexts in the instant case. In its first context, this term refers to the sufficiency of the allegations of the petition for a writ of habeas corpus and the court's decision as to whether to issue an order to show cause. Used in this context, the test is whether petitioner's allegations and the evidence offered in support thereof warrant issuing an order to show cause. An order to show cause will be issued where petitioner has made a prima facie showing in support of his claim for

relief.

Secondly, the term "prima facie case" has a more specialized meaning within the body of jury discrimination law. Here, "prima facie case" refers to the ability of the party claiming systematic exclusion to meet his burden of proof by showing that there has been such exclusion. If the state is unable to rebut the "prima facie case", the writ should be granted if the trial court, upon reviewing all the evidence, feels that petitioner has established systematic exclusion.

Respondent's return to the order to show cause was filed on March 22, 1979. (CR 4) In that return Respondent (petitioner herein) acknowledged that petitioner (respondent herein) had exhausted his state remedies as to the claims presented in the petition but denied that he was entitled to relief.

On April 23, 1979, petitioner (respondent herein) filed a traverse to the return to the order to show cause. In his traverse, he requested an evidentiary hearing. (CR 5)

On March 27, 1980, the District Court, per Judge Karlton, issued an order vacating that portion of the original order to show cause which held that the allegations of the petition were sufficient to establish a prima facie case of discrimination. The parties were directed to supplement and clarify the record under rule 7a of Title 28 United States Code section 2254. (CR 8).

STATEMENT OF FACTS

Respondent first raised the issue of the systematic exclusion of Blacks from the grand jury which indicted him in 1962, prior to his trial.

He raised the issue again both by way of direct appeal of his conviction and by habeas corpus in the state courts.

In all of the above proceedings he was denied relief.

He filed a petition for writ of habeas corpus in the

United States District Court making the same plea for relief. The first judge (The Honorable Thomas J. MacBride) to review his petition in Federal Court believed he had made out a prima facie case of discrimination and issued an order to show cause. The second judge (The Honorable Lawrence K. Karlton) to review his petition set aside the order to show cause, without denying the petition, and requested an expansion of the record to provide more information on which to base a decision. His reasons for requesting an expansion of the record were as follows:

1. To determine if there were Blacks eligible to be Grand Jurors at the times in question and,

2. If there were Blacks eligible for Grand Jury service, did they constitute a statistically significant percentage of the County's population.

Prior to this request, the California Supreme Court in People v Hillery, (1967) 62 Cal.2d. 795, cert. den. , 87 S.Ct. 958, found that the People did not dispute the allegation that no Negro had served on a Kings County grand jury since 1893, the year the county was formed. Finding further that the people introduced official census records showing that in 1960 Negroes constituted 5.1% of the total population of Kings County and that there had been Negroes on petit juries in that county.

From 1893 to the time of the indictment of respondent herein, in Kings County (1962), California, there was only one Superior Court Judge sitting at a time. The grand juries were always selected by the Superior Court Judge sitting at the time. Judge Wingrove took the Bench in 1956 and was the sitting Superior Court Judge at the time the indictment was handed down by the Grand Jury selected by the same Judge Wingrove.

At the hearing in the United States District Court, in response to the District Court Judge's request, Respondent herein (petitioner in the District Court), called witnesses who testified that there were cligible Blacks in the county at

times relevant to the case at bar and that to their knowledge none had ever served on a Kings County Grand Jury. They further testified that Blacks had qualified and served on petit juries at times relevant to the case at bar. In addition to the witnesses heretofore mentioned, respondent herein called an actuary to testify as to what the statistical probability would be that no Blacks would appear on a grand jury between the years 1900 and 1962. He based his analysis on official census data relating to Kings County during those years. He concluded that it would have been virtually impossible to have selected all non-black grand juries, on a random selection basis, during those years. He further testified that the probability that random selection would produce non-black grand juries for the years 1956 to 1962 (the years Judge Wingrove selected the grand juries) was approximately 2/10ths of 1 percent.

The State cross-examined the witnesses called by the respondent herein but did not call any witnesses to refute their testimony and the cross-examination did not change that testimony. The State called the actuary who had testified as petitioner's (respondent herein) expert as its own witness but was unable to elicit a change in his original testimony. The State produced no evidence nor any witnesses, either lay or expert, to refute the evidence produced in support of the claim of discrimination.

Based on the evidence presented by petitioner, (respondent herein), without any evidence or testimony produced by the State to refute or rebut that evidence, the District Court found that there was purposeful discrimination in the selection of the grand jury which indicted respondent herein and on that basis, in accordance with settled law, issued its order granting the petition for Writ of Habeas Corpus.

That District Court decision has been upheld by the United States Court of Appeals for the Ninth Circuit.

REASON FOR DENYING THE PETITION FOR THIS WRIT

This court has previously ruled that discrimination in the selection and makeup of grand juries is violative of constitutional rights requiring a reversal. There does not seem to be any ruling case law which is in conflict with that premise and therefore the law on that issue is settled law.

Petitioner has presented no evidence to this court that there is any conflict between the various circuits, on this issue, that would suggest a review of this case is necessary.

Respondent has no information to suggest that there are any other cases in this court at this time, on this particular issue, which would indicate a review of this case is necessary. Further, petitioner has presented no evidence of any other cases on this issue, currently before this court.

This case does not present issues which are new, unusual or of such novelty as to require an examination by this court.

Petitioner argues that the trial court committed error in applying a rule of per se reversible error in a case of discrimination in the selection of a grand jury when evidence of guilt at the trial is overwhelming. When petitioner takes this position he concedes that discrimination occurred and that the trial court's finding on that issue is correct. Therefore, the issue of whether discrimination occurred or not is not before this court. Petitioner then cites several holdings which he believes support his position that the discrimination is harmless error. However, an analysis of those case holdings clearly demonstrates that his position is not correct and that the District Court and the Appellate Court properly applied the existing settled law.

Petitioner cites Connecticut v Johnson (1983) ___U.S.___, 103 S. Ct. 969, for the doctrine of "harmless error", as it applies to criminal prosecutions. However, respondent contends that a full reading of Johnson compels

the conclusion that it cannot be used in analysis of the error in this case because the Johnson case involves jury instructions which invade the decision-making process of the jury. That process is a separate and distinct problem uniquely related to the trial phase and not the charging phase of a criminal prosecution. Incorporated in the discussion of the Johnson case, petitioner includes references to other cases as follows:

Chapman v California (1967), 386 U.S. 18, 87 S.Ct.824, 17 L. Ed. 2d. 705.

Gideon v Wainwright (1963) 372 U.S. 335.

Payne v Arkansas (1958) 356 U.S.560.

Tumey v Ohio (1927) 273 U.S. 510.

In each of the cases cited above, by petitioner, the court was dealing with a problem which occurred during the trial phase of the proceedings and was analyzing the impact of that error on the jury decision-making process. Therefore, respondent's position is that these cases cannot be used as "bootstrap" arguments for the premise that there can be harmless error when there has been a discriminatory selection of an indicting grand jury.

Petitioner attempts to minimize the impact of Rose v Mitchell (1979) 443 U.S. 545, where this court held that discrimination in the selection of a grand jury foreman in a state court proceeding is reversable error. Such an attempt must fail because the Rose court was examining the very problem presented in the case at bar, i.e. where the court itself becomes the discriminator. In Rose , supra, the members of the grand jury were selected by three jury commissioners from a list of qualified jurors on a random chance basis whereas, the foreman or forewoman was handpicked by the judge of the court having criminal jurisdiction. If the respondent in the Rose case had been able to make out a prima facie case of discrimination there can be no doubt that the conviction would have been overturned by that court. In the case at bar the Superior Court Judge selected all of the

grand jurors on a personal basis and based on the evidence presented at the hearing on the matter a prima facie case of discrimination, in the selection of the grand jury has been made out and stands unrebutted. The District Court properly applied Rose to the case at bar because the Superior Court itself, through Judge Wingrove, became the discriminator.

Petitioner cites Hobby v United States (1984) ___U.S.___, 104 S.Ct.3093, in an attempt to distinguish the instant case from Rose , supra, by minimizing the role of the California grand jury in relation to the Tennessee grand jury discussed in Rose . Chief Justice Burger, in delivering the opinion of the court in Hobby begins by stating that the reason for granting Certiorari was to resolve a conflict between the circuits as to:

> " ... whether discrimination in the selection of federal grand jury foremen, resulting in the under-representation of Negroes and women in that position, requires reversal of the conviction of a white male defendant and dismissal of the indictment against him." p. 3094

Here again, the court was not examining the entire makeup of the federal grand jury, but was merely looking at the foreman and his function in that federal grand jury when it stated:

> "....the federal foreman, unlike the foreman in Rose , cannot be viewed as the surrogate of the judge. So long as the grand jury itself is properly constituted , there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process." p. 3098 (emphasis added)

Chief Justice Burger further emphasized the distinction between the selection of the grand jury foreman and the selection of the grand jury itself when he stated at page 3096:

> "Discrimination in the selection of the grand jury foreman- as distinguished from discrimination in the selection of the grand jury itself - does not in any sense threaten the interests of the defendant protected by the Due Process Clause. Unlike the grand jury itself , the office of the grand jury foreman is not a creature of the constitution; instead, the post of fore-

> man was originally instituted by statute for the convenience of the court." (emphasis added)

It appears to respondent that the message of the Court, in all of the cases, is crystal clear; that message being that, where a court itself becomes the discriminator or discriminating influence in the selection of the grand jury, an indictment handed down by that grand jury cannot stand and any conviction obtained, which follows that judicial taint, is "per-se" reversible error.

Petitioner's second issue contends that "Respondent failed to exhaust his available state remedies since he significantly changed the evidentiary basis of his claim for relief without ever presenting this new evidence to state courts."

In order to determine if respondent truly failed to exhaust his state court remedies, it is necessary to examine the state court record of proceedings.

The California Supreme Court, in reviewing respondent's conviction, found that it was undisputed that no black had ever served upon a grand jury in Kings County from its inception until the time of the opinion. The Court stated:

> "here the record shows that affidavits in support of and in opposition to defendants motion were filed, and a hearing was held at which evidence was taken. Defendant sought to prove that no Negro had served on a Kings County Grand Jury since 1893, the year in which the Couny was organized. The people did not dispute this fact, but introduced evidence based on official census records that established that in 1960 Negros constituted only 5.1% of the total population of Kings County, and that prior to World War II the proportion had been 1% or less." People v Hillery , 62 Cal. 2d. 692, 709 (1965), cert denied 386 U.S. 938 (1967).

Petitioner argues that the probability analysis used dramatically changed the evidentiary basis of respondent's claim after it was filed in the Federal Court. Petitioner fails to realize that although the State Court factual determinations are presumed to be correct, it is the Federal

District Court's duty to independently apply the applicable Federal law to the State Court factual findings. Townsend v Sain , 372 U.S. at 318; Brown v Allen , 344 U.S. 443, 507 (1953); Mata v Sumner , 649 Fed. 2d. 713, 716 (9th Cir. 1981). Respondent's Federal claim is based on his allegation that Blacks were systematically excluded from the grand jury which indicted him. In applying the applicable Federal law and the Equal Protection Clause of the 14th Amendment to such claims, the Supreme Court has observed that:

> "the court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account possible explanatory factors." Alexander v Louisiana , 495 U.S. 625, 630 (1972); Castaneda v Partida , 430 U.S. 482, 496 n.17 (1977); Guice v Fortenberry , 661 F.2d. 496, 505 (5th Cir. 1981).

Petitioner states at page 40 of his Petition that "It is sufficient if the new factual allegations are simply "more compelling." (emphasis added).

Respondent submits that there were no new factual allegations presented to the Federal Court. Petitioner states at page 39 of his petition that, "....respondent now relies upon what he claims is a sophisticated computer analysis of the statistical probability that blacks would not have served ..."

At no time has respondent ever stated that he relied on a "sophisticated computer analysis" of any data. The position of respondent has remained the same throughout all of the proceedings; that blacks were systematically excluded from grand jury service in Kings County, California. An examination of the method of analysis of the census data reveals that it was merely a simple arithmetic calculation to arrive at probabililty data. The fact that a computer was used was merely a means to expedite the calculation.

CONCLUSION

Petitioner has failed to show any dispute between the

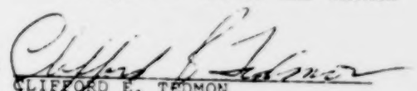
Circuits on the issues raised herein which requires an analysis by this Court. Further, the issues themselves present no new, unique or unusual questions requiring resolution by this Court. All of the issues raised by Petitioner have been resolved at both the District Court and Circuit Court levels in accord with settled law.

Based on the foregoing, it is therefore prayed that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

DATED: January 15, 1985

Respectfully submitted,

LAW OFFICES OF TEDMON AND TEDMON

By: 

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CERTIFICATE OF SERVICE

DANIEL VASQUEZ, the Warden
of San Quentin State Prison

Petitioner,

v.

No. 84-836
October Term, 1984

BOOKER T. HILLERY,

Respondent.

_____/

The undersigned hereby certifies that she is an employee of the LAW OFFICES OF TEDMON & TEDMON and is a person of such age and discretion as to be competent to serve papers.

On January 15, 1985, she personally served a copy of the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT upon Petitioner by placing it in the UNITED STATES MAILS addressed as follows:

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